Supreme Court, U.S.
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No. 91-___

In The

Supreme Court of the United States

October Term, 1991

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

v.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Clear Creek Independent School District's policy of allowing prayers approved by school officials to be delivered as part of commencement exercises violates the Establishment Clause as a matter of law?

LIST OF PARTIES

The caption of the case contains the names of all parties.

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MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 930 F.2d 416 (1991) and is reprinted in the appendix (App. 1). The Fifth Circuit Order denying the suggestion for rehearing by the Panel is unreported (App. 21). The decision of the United States District Court for the Southern District of Texas is also unreported (App. 23).

JURISDICTION

The district court issued its decision granting summary judgment for the Respondents on May 16, 1989.

Petitioners filed their Notice of Appeal on June 9, 1989. On April 18, 1991 the Fifth Circuit affirmed the judgment of the district court. A timely Suggestion for Rehearing by the Panel was denied by the Fifth Circuit on May 22, 1991.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Factual Background

Petitioner, Merritt E. Jones, is the father of Petitioner, Pamela Jones. Pamela is a 1987 graduate of Clear Lake High School. Petitioner, John Doe, is the father of Petitioner, Jane Doe. Jane is a 1988 graduate of Clear Lake High School. After an Unopposed Motion for Leave to

Proceed in Pseudonyms, the Does adopted the pseudonyms to escape retribution from individuals who strongly oppose their position. Petitioners will be referred to collectively as "Jones."

Jane Doe was a senior student at Clear Lake High School, a school operated by Clear Creek Independent School District ("Clear Creek"). All of the Petitioners desired to attend the graduation ceremony of Jane Doe's high school class, which was scheduled for June 1988. Graduation ceremonies at Clear Creek's Clear Lake High School have been traditionally open to all relatives and friends of graduating seniors. Petitioners were invited to Petitioner Jane Doe's graduation ceremony in 1988. All four of the Petitioners have numerous friends and acquaintances who attend, and whose children attend, Clear Creek's Schools. The Petitioners can therefore reasonably expect to have occasion to attend graduation ceremonies at Clear Lake High School for years to come.

Graduation ceremonies at Clear Lake High School have for some years included an invocation during which a member of the senior class leads the audience in prayer. The ceremony is under the direction and control of school district administrators. A prayer is included in the ceremony in accordance with a policy or custom of the school district. A copy of the 1986 Clear Lake High School Commencement program containing reference to the invocation and benediction was before the trial court. The 1986 invocation and benediction were as follows:

INVOCATION

Lord,

Thank you for allowing us to attain this milestone in our lives. Help us all to remember your great kindness and love [unintelligible] we celebrate this great accomplishment in our lives. Since the high school years are a painful growing time undoubtedly, for each, the disappointments and mishaps that have occurred over the last years have just seemed [backed up?] When we take the time in the future to talk over our high school years in the halls of memories, the victories [unintelligible], the successes and defeats [unintelligible], and the friendships above all that never ever meet will all shine through with brilliant radiance and happiness that will only become more meaningful and beautiful as the years pass us by. Thankfully, nothing short of your Gospel and power will ever eclipse these great visions and memories. It is these unequivocal times that we are here to commemorate this afternoon. [Sentence unintelligible] Just bless and keep each of us over the years 'til someday we will all meet again. Amen.

BENEDICTION

Let us pray.

Dear Lord,

As we emerge from the secluded passages please inspire us with your grace and great words of [unintelligible] heaven. Instill in us the spirit of dignity and pride. Inspire us to face all our challenges with confidence and turn obstacles into steppingstones to success. Amen.

Although the invocations given in subsequent years have not included overt references to Christian theology, Clear

Creek and its officials continue to assert the right to include traditional prayers in future graduation ceremonies as long as the prayers are nonsectarian and nonproselytizing.

B. Proceedings Below

On May 11, 1987, Petitioners filed suit pursuant to 42 U.S.C. § 1983, challenging as unconstitutional Clear Creek's policy of allowing invocations containing traditional Christian prayer at its high school graduation ceremonies. Petitioners sought a permanent injunction and declaratory relief that the practice and custom of the Respondent violates Petitioners' rights under the First Amendment to the United States Constitution.

On January 19, 1988, Respondent filed a motion for summary judgment and on May 12, 1989, the district court granted Respondent's motion. Petitioners appealed to the Fifth Circuit.

In its opinion, the district court applied the tripartite test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The district court rejected the Respondent's request to apply the "traditional practice test" developed in *Marsh v. Chambers*, 463 U.S. 783 (1983). Relying on the frequency and duration of the Invocation and Benediction, the age of the students subjected to it, the conduct of the commencement exercises off of school grounds and the voluntary nature of the offering, the district court concluded that under *Lemon* the Respondent's practice does not constitute state endorsement of religion.

On appeal, the Fifth Circuit affirmed the district court based on its review under *Lemon*. The court found that although the Respondent's policy allows invocations addressing a deity, "this is as consistent with secular solemnizing purpose as any religious purpose." *Jones v. Clear Creek Indep. School Dist.*, 930 F.2d 416, 420 (1991). In analyzing the "effect" prong of the *Lemon* test, the court found that the age of the students attending the commencement exercises, the effect of the Invocation on the entire ceremony, the frequency of the Invocation's offering, the Invocation's length, the policy's expressed denominational neutrality and "voluntary observance provisions" together demonstrated that the effect of Clear Creek's policy is not to establish religion. 930 F.2d at 421-422. Finally, the court found that Respondent's policy requiring its officials to screen proposed invocations for sectarian or proselytizing content does not constitute an impermissible entanglement between school authorities and religious institutions. *Id.* at 423.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES QUESTIONS THE COURT HAS AGREED TO CONSIDER IN ANOTHER CASE

This case raises the same issues as a case pending before the Court. The Court has granted a writ of certiorari in *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991). In *Weisman*, the First Circuit, on similar facts, reached a conclusion contrary to the Fifth Circuit's holding in *Jones*. Compare *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990)

with *Jones*, 930 F.2d at 423 (virtually identical facts yield different holdings).

In *Weisman*, the plaintiff was a member of the graduating class at a public middle school.[1] The school's commencement ceremony included an invocation and benediction delivered by a rabbi which addressed the Deity, but contained, as might be expected, no reference to Jesus, or to any particularly Jewish theological concept or figure. The two prayers were drafted with the guidance of a pamphlet entitled "Guidelines for Civic Occasions," published by the National Conference of Christians and Jews and containing, unlike the conclusory language of the Clear Creek policy, specific suggestions as to how a prayer should be drafted in order to be inoffensive enough to serve as a "public prayer in a pluralistic society." Notwithstanding the school's efforts to render the prayers non-sectarian, the district court and the First circuit held that offering the prayers violated the establishment clause and enjoined the district from conducting public prayers in both the middle school from which the plaintiff had graduated and the high school which she was attending at the time of trial.

The Fifth Circuit pointed to Clear Creek's requiring "non-sectarian" invocations as evidence that the effect of Clear Creek's policy is not an endorsement of religion. *See* 930 F.2d at 422 (citation omitted). Under the *Weisman* decision, because an invocation is by its nature a prayer, whether it is sectarian or non-sectarian is irrelevant:

---

[1] The facts of the case are found in the district court's opinion in *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), which the majority of the First Circuit panel adopted for its opinion.

> [f]inally, the non-sectarian guidelines used by the School Committee are not a means of rescue. They are useful in environments where prayer is permitted. Here, it is not the particular nature or wording of the prayers which implicates the first amendment – it is prayer at the ceremony which transgresses the Establishment Clause.

Weisman, 728 F. Supp. at 86 (adopted 908 F.2d at 1090).

Moreover, compelling school officials to determine whether the benedictions and invocations to be offered at a public school graduation ceremony are non-sectarian necessarily "entangles" the government in religious affairs excessively, in violation of the third prong of the *Lemon* test.

> Appellants make much of the fact that the school had chosen to give a suitably non-denominational prayer because school officials distributed a pamphlet entitled "Guidelines for Civic Occasions." These guidelines suggest what kind of prayers should be written. This supervision of the content of the prayers by the school official implicates the entanglement prong. The school is impermissibly involved in regulating the content of the prayer.

908 F.2d at 1106 (Bownes, J., concurring).

Contrary to the *Jones* decision, the *Weisman* opinion recognizes the fact that official sponsored school prayers have, under the Establishment Clause, no place in any part of the program of a public school, including the graduation ceremony. Whatever Clear Creek's policy means, it allows public prayers, composed under guidelines school officials established, to be delivered by students acceptable to school administrators in the course of

an event the government sponsors. This practice necessarily creates the impression of government endorsement of religion and is therefore unconstitutional. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

In light of *Weisman*, the present case creates a conflict in the circuits. *See Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987) (upholding prayers based on historical acceptance). As this Court has already granted *certiorari* in *Weisman*, it should also hear *Jones*. Alternatively, this Court should hold this petition pending a final decision in *Weisman*.

II. THE FIFTH CIRCUIT'S DECISION IMPROPERLY APPLIED *LEMON*

In allowing the offering of invocations at its commencement exercises, Respondent is not accommodating religion. The "accommodation" cases involve arranging the school day to allow students to follow religious pursuits in activities the school does not control. *See, e.g., Zorach v. Klausen*, 343 U.S. 306 (1952). Clear Creek's policy, however, charges a school event, graduation, with the offering of a religious exercise. In so doing, Clear Creek communicates that it goes beyond accommodating religion and, in fact, endorses religion. The policy, therefore, involves Clear Creek in a practice that is not acceptable under *Lemon*. *See* 403 U.S. at 612.

Before 1986, Respondent's commencement exercises included "overt references to Christianity." *Jones*, 930 F.2d at 417. The Fifth Circuit found that Respondent's policy,

adopted on December 15, 1987, would allow for constitutionally permissible invocations to be offered at future graduation ceremonies. *See id.* at 424. As the First Circuit recognized in *Weisman,* however, the effect of allowing prayer at a public school is to communicate an endorsement of religion. 908 F.2d at 1060. The cases indicate that praying is properly seen as a religious exercise. The common understanding is that an invocation is a call to prayer.

Regardless of whether a prayer contemplates a "wholly secular objective," it is an "inherently religious" exercise. *Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. Unit A 1981), *aff'd mem.,* 455 U.S. 913 (1982). In *Jones,* the Fifth Circuit skirted the issue of whether an invocation is a prayer. *See* 930 F.2d at 417 n.1. This Court, however, has recognized that "invocation" is synonymous with prayer. *Cf. Lynch v. Donnelly,* 465 U.S. 668, 685 (1984) (debate over national defense following "a prayer invoking Divine guidance in Congress" does not "demean or taint the sacredness of the invocation"). The primary effect of prayer is to advance religion. *Jager v. Douglas County School Dist.,* 862 F.2d 824, 831 (11th Cir. 1989), *cert. denied,* 490 U.S. 1090 (1989) (citation omitted). A school board may not continue in a practice that has the effect of "communicating a message of government endorsement" of religion. *See Lynch,* 465 U.S. at 692 (O'Connor, J. concurring).

Moreover, the objective and subjective message of Clear Creek's policy should be considered in analyzing the effect of the policy. *Id.* at 690. Even if this Court concludes that an invocation is not necessarily prayer, it

nevertheless should consider the subjective understanding those attending Clear Creek's commencements have of Clear Creek's invocations. *See id.; cf. Jager,* 862 F.2d at 831 (school activities that include prayers put all in attendance in a position of participating in group prayer). The evidence available to the district court demonstrated that the 1986 invocations and benediction were objectively prayers. *See* 930 F.2d at 417. Nothing in Clear Creek's resolution of December 15, 1987 changed its message to those who attend its ceremonies in which the Diety's assistance is requested. *See* 930 F.2d at 417 n.1.

In applying the purpose prong of *Lemon,* the Fifth Circuit did not, as this Court requires, examine "whether government's actual purpose is to endorse or disapprove of religion." *Wallace v. Jaffree,* 472 U.S. 38, 56 (1985). As noted above, it is common ground that an invocation is a prayer. The purpose of prayer is not secular, it is always religious. *Wallace v. Jaffree,* 705 F.2d 1526, 1534 (11th Cir. 1983), *aff'd,* 472 U.S. 38 (1985). As an "intrinsically religious practice," a school activity allowing prayer can never meet the secular purpose prong of *Lemon. Jager,* 862 F.2d at 830.

The Fifth Circuit found that a non-sectarian invocation can "ceremonially serve a legitimate, secular 'solemnizing function.' " *Jones,* 930 F.2d at 420. In her concurring opinion in *Lynch,* Justice O'Connor found that displaying the creche, like declaring Thanksgiving a public holiday, is "the only way[] reasonably possible in our culture" to note the solemnity of the occasion. 465 U.S. at 693. The offering of a prayer, styled an "invocation," however, is not the only way to make solemn Clear Creek's commencement exercises. For instance, a local civic

leader, respected teacher or athletic coach could address the graduates.

The Fifth Circuit improperly limited its review of the excessive entanglement prong of *Lemon*. "In accordance with Jones' complaint, we consider the 'activity' at issue here the invocation's delivery and not its approval and acceptance into the graduation program." 930 F.2d at 423. Clear Creek's policy was adopted after Jones filed the complaint and after the deadline for dispositive motions before the district court. The district court refused Jones' request for additional discovery of Clear Creek's officials regarding the then newly adopted policy. Jones asserted these matters on appeal to the Fifth Circuit. *Cf.* 930 F.2d at 423 (Jones asserted lack of opportunity to depose Clear Creek's officials regarding policy).

The court should have considered the process Clear Creek employs for reviewing invocations in its entanglement discussion. Requiring school officials to determine the acceptable form and appropriate measure of invoking the Deity's assistance at commencment ties together the school and religion.

The other basis of the Fifth Circuit's entanglement analysis was a difference the court found between a public official's review of a church written prayer and his review of a student written prayer. 930 F.2d at 423. To support this distinction, the court relied on Justice O'Connor's concurrence in *Lynch*. *Id.* (citing 465 U.S. at 689). *Lynch*, however, involved the speech an association of merchants offered on public property. The present case involves the speech a school district offers at its

commencement exercise. Whereas in *Lynch*, the government simply leased property on which religious speech was offered, in the present case the government is offering the speech itself. Requiring a secondary school administrator to review proposed prayers forces Clear Creek to not only determine how much religion is acceptable but also whether this appropriate amount of religion is non-sectarian and non-prosyletizing. This is excessive entanglement of the state in religious matter.

III. CONCLUSION

For the reasons stated herein, the Petition for Writ of *Certiorari* should be granted in this case. Alternatively, the Court should hold this petition pending a final decision in *Weisman*.

Respectfully submitted,

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DATED: August 19, 1991.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2638

MERRITT E. JONES, On His
Behalf and as Next Friend of
PAMELA JONES, A Child, ET AL.,

Plaintiffs-Appellants,

versus

CLEAR CREEK INDEPENDENT
SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for
the Southern District of Texas

(April 18, 1991)

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

Graduating seniors and parents brought this suit to enjoin a school district from permitting invocations and benedictions at public high school graduation ceremonies. The district court held that the school district's written policy permitting only nonsectarian and non-proselytizing invocations and benedictions written and delivered by student volunteers at the ceremonies does not violate the Establishment Clause. We affirm.

I. BACKGROUND

Clear Lake High School ("Clear Lake") is within defendant-appellee Clear Creek Independent School District ("Clear Creek"). Clear Lake traditionally includes in its graduation ceremonies invocations and benedictions[1] voluntarily written and presented by members of the graduating senior class. Pre-1986 Clear Lake graduation invocations included overt references to Christianity. Clear Lake's 1986 graduation invocation mentioned "Lord," "Gospel," "Amen," and God's omnipotence. Two Clear Lake students, joined by their fathers, (collectively "Jones") complained that Clear Creek's policy and actions permitting invocations consisting of traditional Christian prayer at high school graduation ceremonies violated the First Amendment's Establishment Clause.

On December 15, 1987, three weeks before this case was to be tried, Clear Creek's Board of Trustees adopted a resolution (the "Resolution") which provides:

> 1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
>
> 2. The invocation and benediction, if used, shall be given by a student volunteer; and

---

[1] Any definitional distinction between an invocation and a benediction is irrelevant to this case. We use "invocation" to describe the opening and closing parts of Clear Creek's graduation ceremonies wherein a student may request a deity's assistance or blessing. *See* WEBSTERS' NINTH NEW COLLEGIATE DICTIONARY 143 (1985) (defining benediction in terms of invocation).

> 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

Clear Creek's Board of Trustees adopted the Resolution at the request of its attorney in this case, who drafted it to conform with Judge Merritt's opinion in *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987) (analogizing to the Supreme Court's approval of legislative prayer in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330 (1983) in holding that nonsectarian, nonproselytizing graduation prayer does not violate the First Amendment).

Applying the tripartite test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971), Judge DeAnda held that the Establishment Clause does not prohibit Clear Creek from permitting invocations that conform with the Resolution, and granted summary judgment for Clear Creek.

II. ANALYSIS

Jones claims that the Resolution is a facially unconstitutional law respecting an establishment of religion. Alternatively, she asserts that the district court prematurely granted summary judgment without giving her an opportunity to discover whether Clear Creek would enforce the Resolution in a constitutional manner.

A. The Resolution's Constitutionality

1. Establishment Clause Applicability

The First Amendment's proscription of laws "respecting an establishment of religion" applies to state

governments through the Fourteenth Amendment. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15, 67 S.Ct. 504, 511 (1947). Because Clear Creek's Board of Trustees promulgated the Resolution pursuant to authority conferred by Texas law, the Resolution is subject to Establishment Clause scrutiny. *Board of Education, Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806-07 (1982).

The Resolution does not escape Establishment Clause scrutiny by only passively limiting students' free choice of graduation speech content. True, the Resolution contemplates invocations written and delivered by student volunteers only with the approval of the graduating senior class. But, according to Clear Creek's May 1987 letter to parents, "commencement is a scheduled school activity, and all school regulations [are] enforced." Clear Creek undisputably controls its commencement programs. Clear Creek's rental of an auditorium is tantamount to ownership for purposes of facility control. And " 'the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated' " . . . "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983) (quoting *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129-30, 101 S.Ct. 2676, 2684 (1981)).

The Resolution is subject to Establishment Clause scrutiny because it is the mechanism through which the

state provides space in a closed forum for arguably religious speech at a government sponsored event. *See Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266-67 (1962) (noncompulsory nature of public school prayer does not "free it from the limitations of the Establishment Clause"); *Jager v. Douglas County School Dist.*, 862 F.2d 824, 831 (11th Cir.) (considering Establishment Clause challenge "[w]hen a religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility"), *cert. denied*, 490 U.S. 1090, 109 S.Ct. 2431 (1989); *Stein*, 822 F.2d at 1407 (recognizing Establishment Clause challenge where graduation invocations voluntarily written and presented by students).

The Resolution also involves Clear Creek in graduation invocations by subjecting proposed invocations to review by the "senior class principal," a faculty representative of a class throughout its four-year attendance at school.

2. Test of Constitutionality

The parties argued the Resolution's constitutionality under *Marsh* while the district court applied *Lemon* in deciding Clear Creek's summary judgment motion. Judges of the other two circuits considering the constitutionality of invocations at public high school graduation ceremonies have demonstrated some disagreement on the test to be applied. *Compare Weisman v. Lee*, 728 F.Supp. 68, 71-75 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990) (applying *Lemon*), *cert. granted*, 59 U.S.L.W. 3635 (1991) *with Stein*,

822 F.2d at 1409 (one judge analogizes to *Marsh* and the other two judges apply *Lemon* as well).

The writer of this opinion is inclined to the opinion that present Supreme Court decisions require that the Resolution satisfy *Lemon*. The Supreme Court has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383, 105 S.Ct. 3216, 3222 (1985); *see also id.* ("reaffirm[ing] that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria"); *Wallace v. Jaffree*, 472 U.S. 38, 63, 105 S.Ct. 2479, 2493 (1985) (Powell, J., concurring) (extolling *Lemon's* analytical usefulness in deciding constitutionality of silent prayer in public schools).

In *Marsh*, the Court upheld the Nebraska legislature's practice of paying a Christian chaplain to begin sessions with an invocation due to the historical acceptance of this practice since our ancestors declared independence from England. 463 U.S. at 792, 103 S.Ct. at 3336. But the Court has later said that

> [s]uch a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.

Edwards v. Aguillard, 482 U.S. 578, 583 n.4, 107 S.Ct. 2573, 2577 n.4 (1987).

3. Lemon Application

a. Purpose

Clear Creek satisfies *Lemon's* first prong by showing that the Resolution has "a secular purpose." 403 U.S. at 612-13, 91 S.Ct. at 2111. Clear Creek's Trustees need not have enacted the Resolution in furtherance of exclusively secular objectives. *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6, 104 S.Ct. 1355, 1363 n.6 (1984); *accord Wallace*, 472 U.S. at 56, 105 S.Ct. at 2489. Though, "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards*, 482 U.S. at 586-87, 107 S.Ct. at 2579.[2]

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[2] We believe that the Supreme Court's requirement of an actual secular purpose encompasses the allusions in prior cases to requirements of secular purpose preeminence. Justice O'Connor recently elaborated on *Lemon's* purpose test:

> the inquiry into the purpose [behind challenged state action] should be deferential and limited. . . . Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief "was and is the law's reason for existence." *Epperson v. Arkansas*, 393 U.S. 97, 108, 89 S.Ct. 266, 272, 21 L.Ed.2d 228 (1968).
>
> . . . I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt. While the secular purpose

(Continued on following page)

Clear Creek contends that it includes invocations in its graduation ceremonies to solemnize these occasions. Justice O'Connor recognizes that such "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose[] of solemnizing public occasions." *Lynch*, 465 U.S. at 693, 104 S.Ct. at 1369 (O'Connor J., concurring in the judgment); *accord County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 109

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> requirement alone may rarely be determinative in striking down a statute, it nevertheless . . . reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.

Wallace, 472 U.S. at 75-76, 105 S.Ct. at 2499-500 (O'Connor, J., concurring in judgment). A majority of the Court cites Justice O'Connor's *Lemon* purpose analysis in *Edwards*, 482 U.S. at 587, 107 S.Ct. at 2579.

As articulated by Justice O'Connor above and the majority opinions in *Lynch*, *Wallace*, and *Edwards*, *Lemon's* purpose prong does not require a determination of whether challenged state action has a greater secular or religious purpose. The opinions that strike down legislation as having a "primary" or "preeminent" religious purpose do so only after analyzing each secular purpose claimed by the state and finding each illusory. *See, e.g., Edwards*, 482 U.S. at 585-94, 107 S.Ct. at 2578-83; *Stone v. Graham*, 449 U.S. 39, 41-42, 101 S.Ct. 192, 194 (1980); *Lubbock Civil Liberties Union v. Lubbock Independent School Dist.*, 669 F.2d 1038, 1044 (5th Cir.), *reh'g denied*, 680 F.2d 424 (1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800 (1983).

That the *Lemon* Court required "a" secular purpose along with a "primarily" nonreligious effect further convinces us that we need not divine a state's primary purpose in promulgating a challenged law. *See Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111.

S.Ct. 3086, 3102 n.46 (1989); *Stein*, 822 F.2d at 1409; *Weisman*, 908 F.2d at 1095 (Bownes, J., concurring).

Jones asserts that Clear Creek's solemnization rationale is only a pretext for the Resolution's introduction of prayer into public schools. But unlike the plaintiffs in *Wallace*, *Edwards*, or *Lubbock*, Jones offers no evidence of religious motivation through legislative history or overt religious references in the Resolution. In fact, through its student option, and the nonproselytization and nonsectarian mandates, the Resolution deemphasizes the religious significance of allowed invocations.

While the Resolution apparently tolerates invocations addressing a deity, we think that this is as consistent with the secular solemnizing purpose as any religious purpose. It is precisely in acknowledging a principle of transcendence, with simple terms of universal understanding – like "God" – that graduation attendees may perceive the profound social significance of the occasion. It is not implausible that Clear Creek's Trustees intended the Resolution to foster just such a perception in many, if not most, attendees. The Resolution's "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." *Lynch*, 465 U.S. at 682, 104 S.Ct. at 1364 (citation omitted). We reject a reading of the First Amendment that would freeze either church and state or religion and politics into perpetually antagonistic postures.

Jones argues that Clear Creek may not employ religious means to accomplish goals that can be attained by non-religious means. *See Lubbock*, 669 F.2d at 1045. This court has even held that a statute cannot employ an

obvious religious means to serve otherwise legitimate secular interests. *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913, 102 S.Ct. 1267 (1982). But to say that the Resolution employs a "religious means" is to confuse purpose and effect analyses under *Lemon*. Unlike the laws at issue in *Lubbock* and *Treen*, the Resolution takes no position on whether a proposed invocation references a deity, and only seeks to limit sectarianism and proselytization. The Resolution does not employ an obviously religious means to solemnize Clear Creek graduation ceremonies.

Moreover, we are unaware of an exclusively secular equivalent for Clear Creek's solemnization choice. *See Lynch*, 465 U.S. at 716-17, 104 S.Ct. at 1382 (Brennan, dissenting) (as "ceremonial deism," invocations are "uniquely suited to serve such wholly secular purposes as solemnizing public occasions"). Jones offers no solemnization substitute other than a valedictory address, which Clear Lake supplemented in its 1986 program with an invocation. We do not consider invocations such as the 1987 proposal approved by Jones[3] any more secular for

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[3] Jones agreed that the following invocation is not offensive:

> We ask that people gathered here today be grateful for the faculty, the administration, and the students of Clear Lake High School. We are most thankful to live in a country which stresses the importance of individual freedom. Thank you for this wonderful year, for the friendship and fellowship that has grown among us, and for the memories that we will cherish forever. Thank you for our past experience, and please, help us all to be successful in the future.

veiling references to a deity in pronouns and hidden objects.

Because Clear Creek has a secular purpose for allowing invocations at its graduations, we agree with the district court that the Resolution satisfies *Lemon*'s first prong as a matter of law.

b. Effect

Jones urges us to follow *Weisman*, 728 F.Supp. at 73, in holding that the primary effect of nondenominational prayer at a voluntarily attended public high school graduation ceremony is to advance religion in contravention of *Lemon*'s second proscription. But

> [r]ather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith – as an absolutist approach would dictate – the Court [mandates scrutiny of] challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so. . . .
>
> In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. . . . The purpose of the Establishment Clause "was to state an objective, not to write a statute." . . . The Clause erects a "blurred, indistinct, and variable barrier *depending on all the circumstances of a particular relationship.*"

Lynch, 465 U.S. at 678, 104 S.Ct. at 1361-62 (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 688, 90 S.Ct. 1409, 1411 (1970) and *Lemon*, 403 U.S. at 614, 91 S.Ct. at 2112) (emphasis added). The facts here differ from

those in *Weisman*, and we conclude that the Resolution's primary effect is not to advance or endorse religion.

Constitutional examples of governmental religious accommodation abound. Nebraska may pay a Protestant chaplain to open its legislature's daily sessions with an invocation. *Marsh*, 463 U.S. at 795, 103 S.Ct. at 3338. Our statutorily prescribed national motto is "In God We Trust." 36 U.S.C. § 186. The Pledge of Allegiance, recited daily by thousands of public school children, describes us as "One nation under God." *Lynch*, 465 U.S. at 676, 104 S. Ct. at 1361. We even begin each public hearing in federal court with the invocation "God save the United States and this Honorable Court."

The principal difference between the legislative prayer approved in *Marsh* and any prayer sanctioned by the Resolution is that the latter occurs during a public school function. We recognize that we are to be

> particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 482 U.S. at 583-84, 107 S.Ct. at 2577; *see also Lubbock*, 669 F.2d at 1043 (explaining special concern for governmental religious neutrality in public schools).

Yet the students affected by the Resolution are the least impressionable people receiving special protection

from religious inferences under the Supreme Court's school prayer decisions. The graduation ceremony lies on the threshold of high school students' transitions into adulthood, when religious sensibilities hardly constitute impressionable blank slates. All of the students will have seen United States currency, and many will have witnessed judicial or legislative proceedings. Given *Marsh*, these students enter an adult world in which they are expected to tolerate some governmental accommodation of religion.

In determining the Resolution's primary effect, we focus on an invocation's effect in the context of an entire graduation ceremony. *Lynch*, 465 U.S. at 679-80, 104 S.Ct. at 1362 ("[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause"). Several characteristics combine to distinguish the Resolution's invocations from the school prayer stricken in *Engel*, *Stone*, *Wallace*, *Treen*, *Jager*, and possibly *Weisman*. While striking down a New York regulation prescribing a daily prayer for recitation by public school children, the Supreme Court even notes that

> [t]here is of course nothing in the decision reached here that is inconsistent with the fact that *school children and others* are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or *ceremonial* occasions bear no true resemblance to

> the unquestioned religious exercise that the State of New York has sponsored in this instance.

Engel, 370 U.S. at 435 n.21, 82 S.Ct. at 1269 n.21 (emphasis added).

Most students witness the invocations sanctioned by the Resolution once in four years, as opposed to daily or weekly. Consistent with the Resolution's nonproselytization requirement, the invocations are historically brief – under one minute. Students deliver the invocations in an assembly where many parents are present rather than a classroom setting, where the prospect of subtle official and peer coercion warrants stricter separation of the state from things religious.

Nor do we overlook Clear Creek's passive role in the invocation inclusion process. The Resolution facilitates invocations, but it leaves their existence, and reference to a deity, to the discretion of each graduating class and student volunteer. And

> to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, *and active involvement* of the sovereign in religious activity." 397 U.S., at 668, 90 S.Ct., at 2111.

Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337, 107 S.Ct. 2862, 2869 (1987) (emphasis added). Clear Creek's passive role distinguishes the state-sanctioned, officially written prayers stricken in *Engel*.

While a law's denominational neutrality and voluntary observance provisions are not enough alone to "free it from the limitations of the Establishment Clause," *Engel*, 370 U.S. at 430, 82 S.Ct. at 1266-67, these factors in concert with the others specified above mollify any advance or endorsement of religion consistent with the Resolution.

We think that the Resolution allows invocations to enhance the significance of graduation to attendees while minimizing any governmental advancement or endorsement of religion. The Resolution no more advances or endorses religion than the myriad of constitutional public religious accommodations cited above; given its solemnization function, the Resolution has a legitimate primary effect. *Accord Stein*, 822 F.2d at 1409 (approving nonsectarian public high school graduation invocations for solemnization purposes); *Bogen v. Doty*, 598 F.2d 1110, 1114 (8th Cir. 1979) ("we suggest that establishing solemnity is the primary effect of all invocations at gatherings of persons with differing views on religion").

c. Entanglement

Jones argues that the Resolution's provision that invocations be nonsectarian and nonproselytizing constitutes an excessive entanglement of government and religion in violation of *Lemon*'s third proscription. We disagree.

"Entanglement is a question of kind and degree." *Lynch*, 465 U.S. at 684, 104 S.Ct. at 1365. Even if school officials review voluntarily submitted invocations for

sectarianism and proselytization,[4] any entanglement that this fosters is not constitutionally excessive. Such review must occur before the graduation ceremony, so the Resolution does not mandate the "continuing supervision of nonsecular activity" proscribed in *Lubbock*. *See* 669 F.2d at 1047 (school official monitoring of religious meetings excessive entanglement). In accordance with Jones' complaint, we consider the "activity" at issue here the invocation's delivery and not its approval and acceptance into the graduation program.

In his *Weisman* concurrence, Judge Bownes writes that an invocation policy in which speakers are chosen by the school district and given guidelines suggesting the content of prayers violates *Lemon*'s entanglement prong. 908 F.2d at 1095; *cf. Jager*, 862 F.2d at 831 (no entanglement when school does not choose invocation speaker or monitor content). The Resolution does not involve Clear Creek in choosing among those wishing to prepare and present graduation invocations, and Jones presents no evidence that Clear Creek is so involved. As for invocation content, the Resolution proscribes certain types of invocations without prescribing any invocation. We think that Clear Creek seeks to solemnize its graduation ceremonies in a manner most acceptable to all attendees, and in doing so may constitutionally pre-screen proposed invocations for sectarianism and proselytization.

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[4] The Resolution's third proviso may be understood as either an admonition to those student volunteers writing the invocations or as a mandate that school officials review proposed invocations for sectarianism or proselytization.

The Supreme Court has only held state action unconstitutional under *Lemon*'s entanglement prong when it has found excessive entanglement between governmental and religious institutions. *See Lynch*, 465 U.S. at 684, 104 S.Ct. at 1365 ("no evidence of contact with church authorities concerning the content or design or the exhibit prior to or since [city's] purchase of the créche"); *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27, 103 S.Ct. 505, 511-12 (1982) (zoning ordinance allowing churches veto power over certain liquor licenses unconstitutional entanglement); *Lemon*, 403 U.S. at 625, 91 S.Ct. at 2117 (state salary supplements to teachers of secular subjects in parochial schools excessive entanglement); *Walz*, 397 U.S. at 674-75, 90 S.Ct. at 1414 (New York may constitutionally exempt religious organizations from real property tax).

Justice O'Connor states the proposition directly: "[t]he entanglement prong of the *Lemon* test is properly limited to institutional entanglement." *Lynch*, 465 U.S.at 689, 104 S.Ct. at 1368 (O'Connor, J., concurring); *accord* Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 971-75 (1989) (arguing that the original disestablishment decision sought to separate the institutions of church and state).

By requiring that invocations be nonsectarian and written and presented by student volunteers, the Resolution effectively excludes religious institutions from its purview. Such exclusion renders entanglement impossible under Justice O'Connor's statement of *Lemon*'s third test.

Thus, because the Resolution has a secular solemnizing purpose and primary effect, and does not excessively

entangle Clear Creek with religion, we agree with the district court that the Resolution does not violate the Establishment Clause.

B. Discovery Adequacy

Jones does not complain of any language included in a Clear Creek graduation ceremony after 1986 and agrees that the 1987 invocation was not offensive. Yet she asserts that the district court prematurely granted summary judgment based on the Resolution's constitutionality without giving her an opportunity to depose Clear Creek officials and discovery whether Clear Creek would constitutionally apply the Resolution. Jones characterizes the Resolution as Clear Creek's last minute attempt to dodge an injunction given its pre-1987 blatantly sectarian invocations.

Injunctive relief is inappropriate when sought to prevent injury that is speculative at best. *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 263 (5th Cir. 1984). Even where school districts have "*very reluctantly* complied with constitutional standards," this court has twice refused to reverse a district court's denial of equitable relief. *See Lubbock*, 669 F.2d at 1049 (emphasis in original); *Meltzer v. Board of Public Instruction of Orange County, Florida*, 548 F.2d 559, 568 (5th Cir. 1977), *aff'd on rehearing*, 577 F.2d 311 (1978), *cert. denied*, 439 U.S. 1089, 99 S.Ct. 872 (1979). We find no abuse of discretion, *see United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897 (1953), in the district court's final denial of injunctive and declaratory relief in this case.

III. CONCLUSION

Because the Resolution does not violate the Establishment Clause and the district court did not abuse its discretion in denying Jones equitable relief based on Clear Creek's pre-Resolution actions, we AFFIRM.

GARWOOD, Circuit Judge, with whom Barksdale, Circuit Judge, joins specially concurring.

The district court applied the tripartite test of *Lemon v. Kurtzmann*, 91 S.Ct. 2105 (1971), and upheld the school district's policy. Appellants do not argue that some other test should be applied, but rather contend that *Lemon* controls and that the policy fails to meet *Lemon*'s requirements. Appellees defend the policy under *Lemon* and also rely on *Marsh v. Chambers*, 103 S.Ct. 3330 (1983). Judge Reavley's opinion convincingly demonstrates that *Lemon* is satisfied, and we completely agree. Moreover, in the present context, it seems apparent that *Lemon* poses the challenged policy's highest hurdle, and if it clears *Lemon* then it passes establishment clause muster under any reasonably conceivable test. Accordingly, we join in so much of Judge Reavley's opinion as deals with whether the policy is constitutional under *Lemon*, but without reaching the question of whether some less restrictive or rigid test might be more properly applied in this setting.[1]

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[1] In *Lynch v. Donnelly*, 104 S.Ct. 1353, 1362 (1984), the Court observed that "we have repeatedly emphasized our

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That is a matter on which the Supreme Court may well further enlighten us before long. *See Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted* 59 U.S.L.W. 3635 (1991).

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unwillingness to be confined to any single test or criteria in this sensitive area." There are good arguments why a case of this kind might be better analyzed under *Marsh*, or some variant thereof, than under *Lemon*. See *Jager v. Douglas County School District*, 862 F.2d 824, 836-838 (11th Cir. 1988) (dissenting opinion of Chief Judge Roney); *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409-10, 1412-15 (6th Cir. 1987) (opinions of Judges Merritt and Wellford); *Weisman v. Lee*, 908 F.2d 1090, 1098-99 (1st Cir. 1990) (dissenting opinion of Judge Campbell), *cert. granted* 59 U.S.L.W. 3635 (1991). It also appears to us that the force of certain of our precedents in this area, particularly *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir.), *reh'g denied*, 680 F.2d 424 (1982), *cert. denied*, 103 S.Ct. 800 (1983), may have been called into question by *Board of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2356, 2366, 2370-73 (1990). Where that might lead were the policy at issue here somewhat different likewise need not be reached.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-2638

MERRITT E. JONES, on his behalf and as next friend of PAMELA JONES, a child, ET AL.,

Plaintiffs-Appellants,

versus

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(May 22, 1991)

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CLERKS NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MERRITT E. JONES, On his behalf and as Next Friend of PAMELA JONES, A Child	§ § § §	CIVIL ACTION NO. H-87-1463
VS.	§ §	
CLEAR CREEK INDEPENDENT SCHOOL DISTRICT	§ § §	

MEMORANDUM AND ORDER

(MAY 16 1989)

Pending before the Court in the above referenced cause is Defendant Clear Creek Independent School District's motion for summary judgment. Plaintiffs filed this civil rights action on May 11, 1987, pursuant to 42 U.S.C. section 1983, challenging the constitutionality of Christian invocations and benedictions at the graduation ceremonies of public Clear Lake High School. On December 15, 1987, six months after this suit was initiated, the school district's Board of Trustees adopted a resolution permitting only nonproselytizing, nonsectarian invocations and benedictions, written by volunteer students, to be delivered at graduation exercises away from the high school's grounds. The court considered Defendant's motion for summary judgment during a conference on February 3, 1988, when the Court ordered Plaintiff to respond in writing and took the matter under advisement. Now, for reasons delineated below, after reviewing the record and the applicable law, the Court concludes that Clear Creek Independent School District's current

policy regarding commencement invocations and benedictions is constitutional. Accordingly, the Court is of the opinion that there is no longer a justiciable controversy in the case at bar and that as a matter of law summary judgment should be granted to Defendant.

The facts here are not disputed. This suit was originally filed on May 11, 1987, less than two weeks before a scheduled graduation ceremony, by senior student Pamela Jones and her father Merritt Jones. Plaintiffs withdrew their request for an injunction against the May 1987 invocation after reviewing the proposed statement and finding it to be unoffensive and nonsectarian, in contrast to the distinctly Christian prayer given at the previous year's ceremony. After Pamela graduated in 1987, with leave of Court an anonymous daughter and father, under the pseudonyms Jane and John Doe, were substituted as nominal Plaintiffs following a standing challenge because the Court found the issue to be "capable of repetition but evading review." *See Roe v. Wade*, 410 U.S. 113 (1973); *Grossberg v. Deusebio*, 380 F.Supp. 285, 292 (E.D. Va. 1974); *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987).

In contrast to the once bright-line wall of separation between church and state, the Court perceives in United States Supreme Court decisions over the past thirty-five years a growing emphasis upon accommodation between government and religion,[1] within the ambit of a required

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[1] In the context of kindergarten-twelfth grade public schools, *see, e.g., Everson v. Board of Education*, 330 U.S. 1 (1947) (permitting state transportation of children to and from

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policy of neutrality, as a frequently appropriate means to resolve tension between the free exercise and establishment clauses of the first amendment.

Justice Douglas declared thirty-seven years ago,

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of the government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

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church-related schools); *Zorach v. Clauson*, 343 U.S. 306 (1952) (sustaining a released time program for children to attend religious classes off school grounds); *Board of Education v. Allen*, 392 U.S. 236 (1968) (allowing state-supplied secular textbooks for church-affiliated elementary schools; *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a Minnesota statute permitting tax deductions to parents for their children's educational expenses in any elementary or secondary school as promoting the secular goal of education).

We have long been used to "such government acknowledgement of religion as legislative prayers . . . , government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable Court.' Those government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public occasions, expressing confidence in the future and encouraging recognition of what is worthy of appreciation in society." *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, Jr., concurring). Justice O'Connor recently proclaimed that "the Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* at 673. Her statement falls within a long line of Supreme Court acknowledgements of the traditional, cultural significance of religion in American life.

The Supreme Court has developed two key tests, both reflecting the spirit of accommodation and the growing perception of the wall of separation between church and state as a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship," in determining whether a law, program, or practice violates the establishment clause. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Under the primary one, set out in *Lemon v. Kurtzman*, to avoid an establishment clause issue the court must find the challenged practice (1) to have a secular purpose, (2) with a principal effect of neither advancing nor inhibiting religion, and (3) to not foster an excessive entanglement of the state with religion. *Id.* at 612-13.

In *Lynch v. Donnelly*, the majority of the Supreme Court negated a per se rule or "absolutist" application of *Lemon* to establishment clause questions. 465 U.S. 668, 678 (1984) (rejecting establishment clause objection to a creche set up on public property at Christmas season). The Court defined, as an "absolutist" approach, one "mechanically invalidating all governmental conduct or statutes that confer benefits or give recognition to religion in general or to one faith." *Id.* at 679; *see also Mueller v. Allen*, 463 U.S. 388, 394 (1983) (a helpful signpost); *Meek v. Pittinger*, 421 U.S. 349, 359 (1975); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Instead, the challenged practice should be examined in context to evaluate its purpose and effect. *See, e.g., Bogen v. Doty*, 598 F.2d 1110, 1114-14 (8th Cir. 1979).

The other test, applied in *Marsh v. Chambers* when the Supreme Court sustained Nebraska's practice of opening its state legislature with daily prayer led by a chaplain paid from public funds, is based on historical practice. 463 U.S. 783 (1983). Because of the long history of such legislative prayers, the Supreme Court concluded that the framers of the Constitution did not intend and would not have considered this deeply rooted tradition, a national practice for over two hundred years, to be offensive to the establishment clause. *Id.*

Defendant's motion for summary judgment relied upon a Sixth Circuit case, *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), the first federal appellate decision focusing upon the constitutionality of high-school, commencement invocations and benedictions. In that case, the appellate court held that graduation invocations should not automatically be deemed

unconstitutional. *Id.* at 1409. Analogizing the "solemnizing function" of invocations and benedictions at graduation exercises to the ceremonial prayer in legislative sessions in *Marsh* and applying the *Marsh* historical tradition test in a very generalized and expansive fashion, the Sixth Circuit ruled that such a practice can be constitutional if it "preserve[s] the principle of equal liberty of conscience" and does not "go beyond the American civil religion" into sectarian and/or proselytizing concerns. *Id.* at 1409. Clear Lake High School's recently adopted policy meets the nonsectarian standards set out in *Stein* and even echoes the court's language.

The facts in *Stein* were not disputed. Two public high schools in western Michigan included invocations and benedictions in their commencement ceremonies, at which attendance was voluntary and not a prerequisite for receipt of a diploma. At Plainwell High School, two unsupervised, volunteer students drafted and presented their own statements, while at Portage Central High School, graduating seniors for the previous fifteen years had asked local Christian clergymen to deliver an invocation and benediction. The court, referring generally to the tradition of ceremonial prayer in public circumstances to accommodate the multiplicity of religions in the United States, recognized its "guiding principle" as "equal liberty of conscience," which must be limited only when it oversteps "the common interest in public order and security" and thereby violates the establishment clause. *Id.* at 1408-09. The Sixth Circuit concluded that the contents of the challenged invocations and benedictions in *Stein* went beyond the acceptable bounds of this American civil religion, undefined by the court, and thus required that the

plaintiff's liberty of conscience give way to the state interest in "public order and tradition." *Id.* at 1409. Although noting there is less chance for religious indoctrination at a public ceremonial gathering in the presence of parents and other adults than in a closed class room with a supervising teacher as an authority figure, the court still decided that the actual language of the disputed invocations and benedictions constituted a government endorsement of exclusively Christian religion.

While this Court finds some of the Sixth Circuit's analysis of specific factors valuable, upon review of the law the Court concludes that the *Stein* court's approach through the *Marsh* traditional practice test is incorrect. First, the high school practice in the *Stein* schools as well as that in the case at bar existed at the longest for only a couple of decades. *Marsh's* concern with the framers' intent in drafting the first amendment and with the practices of their time is not relevant to contemporary public school graduation exercises.[2] Second, the Supreme Court has suggested that in establishment clause challenges affecting primary public schools, the appropriate test is the far more frequently used, fact-oriented *Lemon* evaluation. *See, e.g, Edwards v. Aguillard,* 107 S.Ct. 2573, 2577 n.4, 2578 (1987); *Grand Rapids School Dist. v. Ball,* 473 U.S. 373,

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[2] Moreover, since formal education was largely conducted at religiously affiliated private schools at the time the Constitution was written, and since the secular public school did not come into existence until around 1840, efforts to determine the framers' intentions concerning them are merely speculation. *See* Wood, *Religion and Education in American Church-State Relations,* 26 T. Church & State 31 (1984); *See also, Schempp,* 374 U.S. at 238 (Brennan, J., concurring).

383 (1985). Accordingly, this Court has applied the *Lemon* test to the facts in the case at bar.

In regard to the first prong of the *Lemon* test, a solely secular purpose is not required. *Wallace v. Jaffree*, 105 S.Ct. 2479, 2490 (1985); *Lynch*, 465 U.S. at 681, n.6; *Abington School District v. Schempp*, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring). While a shared religious tradition is reflected in a brief, nonsectarian invocation, the Court finds that such a practice can ceremonially serve a legitimate, secular "solemnizing function," as suggested by Justice O'Connor, to add cultural significance to an important moment in the lives of graduates and their families without being pedagogical or proselytizing. *Lynch* 465 U.S. at 692-93.

The second prong of *Lemon*, requires that the primary effect of the practice neither advance nor inhibit religion. The *Lemon* test's focus upon factual circumstances permits a significant distinction between a flexible approach to nondenominational invocations by volunteer students at an optional graduation ceremony and the Supreme Court's hard and fast prohibition of activities suggestive of religious instruction or worship in the classroom during the vulnerable years of compulsory elementary and secondary education.

The United States Supreme Court has traditionally been extremely protective of primary and secondary school students in barring patently religious activities and instruction on school premises. *See, e.g., McCollum v. Board of Education*, 333 U.S. 203 (1948) (release-time program for religious instruction in public school classrooms violates establishment clause); school prayer cases,

including *Engel v. Vitale*, 370 U.S. 421 (1962) (daily recitation of nondenominational prayer, composed by state officials, in public schools is unconstitutional) and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (invalidation of Pennsylvania State law requiring daily reading of ten Bible verses even though children could be excused from participation upon parental written request); *Stone v. Graham*, 449 U.S. 39 (1980) (striking down a Kentucky statute prescribing posting of Ten Commandments on every classroom wall); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding an Alabama statute mandating a moment of silence unconstitutional because legislative history revealed its sole purpose was to encourage and endorse religion); and *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987) (Louisiana statute forbidding teaching of evolution without balancing instruction in "creation science" is unconstitutional because its primary purpose was to advance a particular religious belief). In recognition of the fundamental role of public schools in teaching and transmitting values, the courts have expressed as reasons for the special shielding of this captive and vulnerable student audience the expectations of families entrusting their children that public schools will not indoctrinate students with religious beliefs potentially contrary to their own; impressionability of youngsters; compulsory attendance; emulation of teachers as role models; and susceptibility of children to peer pressure. *See, e.g., Aguillard* 107 S.Ct. at 2577.

Many factors here distance the minimally involved school district from a potential perception of its graduation exercise as a state endorsement of religion. The Clear Lake High School graduation is held away from school

grounds at the University of Houston's Hofheinz Pavillion. The very brief invocation and benediction, given by volunteer students not daily, weekly, or monthly, but only once a year, are aimed at a largely adult audience of diverse religious beliefs which changes each time, thus diminishing any opportunity for indoctrination. Indeed, the graduating class is comprised of young adults, the majority over eighteen years of age, who are embarking upon careers in a multiform society in which they will be exposed to various sects and to which they presumably now bring developed ideas and a mature capacity to evaluate. The school district's policy, while not dictating the precise content of the invocation, insures that no individual faith is advanced at the expense of others. Not only is the inclusion of the invocation and/or benediction voluntary, dependent upon a student's willing involvement, but attendance at the ceremony is optional, is not necessary for graduation, and in fact does not guarantee that participants will receive their diplomas, which are sent out only to those who pass final examinations after the ceremony. While each factor alone is not dispositive, together the circumstances work against a simplistic characterization of the invocation or benediction as a dangerous government endorsement of religion.

The last prong of the *Lemon* test prohibits excessive entanglement of church and state. As noted above, the link between the school and the annual commencement program is minimal, with students voluntarily developing most of the content. Oversight by the graduating class's principal, who gives advice and consent to insure

that any proposed invocation or benediction is "consistent with the principle of equal liberty of conscience" and "nonsectarian and nonproselytizing in nature," is not sufficient entanglement to violate the establishment clause. Resolution of Board of Trustees of the Clear Creek Independent School District, December 15, 1987.

Accordingly, because the Court finds that the inclusion of a brief invocation and/or benediction in Clear Lake High School's graduation ceremony, under the facts presented here, does not as a matter of law violate the first amendment's establishment clause, the Court

ORDERS that summary judgment is GRANTED to Defendant and this case is DISMISSED with prejudice.

DONE in Houston, Texas, this 12th day of May, 1989.

/s/ James DeAnda
JAMES DeANDA
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MERRITT E. JONES, On his behalf and as Next Friend of PAMELA JONES, A Child	§	CIVIL ACTION NO. H-87-1463
VS.	§	
CLEAR CREEK INDEPENDENT SCHOOL DISTRICT	§	

FINAL JUDGMENT

(MAY 16 1989)

Pursuant to the Memorandum and Order signed on this date, the Court

ORDERS that final judgment is entered in favor of DEFENDANT Clear Creek Independent School District. Each party shall bear its own costs.

This is a Final Judgment.

DONE in Houston, Texas, this 12th day of May, 1989.

/s/ James DeAnda
JAMES DeANDA
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Supreme Court, U.S.
FILED
SEP 17 1991
OFFICE OF THE CLERK

(2)

No. 91-310

In The

Supreme Court of the United States

October Term, 1991

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

v.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Clear Creek Independent School District's policy of allowing nonproselytizing, nonsectarian invocations and benedictions by student volunteers at high school graduation exercises violates the Establishment Clause of the First Amendment as a matter of law?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit are correctly identified in the caption of this Opposition.

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No. 91-310

In The

Supreme Court of the United States

October Term, 1991

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

v.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

In May of 1989, the United States District Court for the Southern District of Texas entered final judgment in favor of Clear Creek Independent School District. This judgment was not reported. Subsequently, the United States Court of Appeals for the Fifth Circuit rendered a decision in favor of the School District which was reported at 930 F.2d 416 (1991). The Motion for Rehearing was denied by the Fifth Circuit. Copies of these decisions

have been attached as an Appendix to the Petition for Writ of Certiorari, and for the sake of brevity, will not be reprinted here.

JURISDICTION

This Court's jurisdiction is not in question.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides the following guidance in this case:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Underlying Facts

Petitioner, Merritt Jones, is the father of Petitioner, Pamela Jones. Pamela is a 1987 graduate of Clear Lake High School. Petitioner, John Doe, is the father of Petitioner, Jane Doe. Jane is a 1988 graduate of Clear Lake High School who was added to the suit to remedy a standing problem. Petitioners will be referred to collectively as "Jones." Clear Creek Independent School District is a duly constituted body politic, with powers and

jurisdiction pursuant to Texas law. Respondent will be referred to as "School District" or "District."

The Jones brought suit to enjoin the School District from allowing "prayers" to be given at high school graduations. In particular, the Jones complain of the invocation and benediction given during the 1986 Clear Lake High School graduation ceremonies. While there is some dispute over the exact wording, the Jones contend that the 1986 invocation and benediction were given as follows:

Invocation

Lord,

> Thank you for allowing us to attain this milestone in our lives. Help us all to remember your great kindness and love [unintelligible] we celebrate this great accomplishment in our lives. Since the high school years are a painful growing times undoubtedly, for each, the disappointments and mishaps that have occurred over the last years have just seemed [backed up?] When we take the time in the future to talk over our high school years in the halls of memories, the victories [unintelligible], the successes and defeats [unintelligible], and the friendships above all that never ever meet will all shine through with brilliant radiance and happiness that will only become more meaningful and beautiful as the years pass us by. Thankfully, nothing short of your Gospel and power will ever eclipse these great visions and memories. It is these unequivocal times that we are here to

commemorate this afternoon. [Sentence unintelligible.] Just bless and keep each of us over the years 'til someday we will all meet again. Amen.

Benediction

Let us pray.

Dear Lord,

As we emerge from the secluded passages please inspire us with your grace and great words of [unintelligible] heaven. Instill in us the spirit of dignity and pride. Inspire us to face all our challenges with confidence and turn obstacles into stepping stones to success. Amen.

The Jones have not complained of any invocations or benedictions since those delivered at the 1986 graduation ceremonies. In fact, the Jones have admitted that the invocation and benediction given at the 1987 ceremony were within constitutional parameters.

On December 15, 1987, the School District adopted a resolution, formalizing a previously unwritten doctrine, allowing for the inclusion of invocations and benedictions that are "nonsectarian" and "nonproselytizing" in nature. On January 19, 1988, the School District filed a Motion for Leave to Supplement or File Dispositive Motion Beyond Cut-Off. This motion was prompted by recent case law developments, the school board resolution and the late filing of a responsive pleading by the Jones. The district court granted the School District the requested relief.

The Jones claimed the resolution was still unconstitutional and that further discovery was necessary. The district court found there was no longer a justiciable controversy and summary judgment was granted in favor of the School District.

B. Proceedings Below

On May 11, 1987, Petitioners filed suit pursuant to 42 U.S.C. § 1983, challenging as unconstitutional the School District's policy of allowing invocations and benedictions allegedly containing traditional Christian prayer at its high school graduation ceremonies. Petitioners sought a permanent injunction and declaratory relief that the practice and custom of the Respondent violated Petitioners' rights under the First Amendment of the United States Constitution.

The School District was granted summary judgment by the district court on May 12, 1989. This finding was premised on the School District's Board of Trustee's resolution adopted on December 15, 1987 which permitted only the delivery of nonproselytizing, nonsectarian invocations and benedictions, written by volunteer students, to be delivered at graduation exercises away from the high school's grounds. The court reasoned that this practice does not constitute state endorsement of religion under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Petitioners appealed to the Fifth Circuit.

The Fifth Circuit affirmed the lower court's holding. The Fifth Circuit also held that the School District's practice passes constitutional muster under the tripartite

Lemon test. The invocations (the term being used synonymously with benedictions) served to solemnize the graduations. *Jones v. Clear Creek Independent School District*, 930 F.2d 416, 420 (1991). The effect of the invocations neither advanced nor endorsed religion, but was merely on accommodation of religion. *Id.* at 422. Lastly, there is no excessive entanglement as the School District was not involved with any religious institutions in its approval of the invocations. *Id.* at 423.

REASONS FOR DENYING THE WRIT

A. The Present Case Is Factually Distinguishable From *Weisman v. Lee.*

Petitioners claim that the facts in this case are "virtually identical" to those found in the case of *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991). However, *Weisman* is distinguishable in a number of very important respects. First, the invocation at issue in *Weisman* was delivered by a rabbi. In the present case, the invocations were presented by student volunteers. Unlike the rabbi, the student volunteers were not clothed with the indicia of religion. Second, the presentation of an invocation by a rabbi implies a certain degree of entanglement with a particular religion, namely Judaism. The volunteer students do not give the appearance of any affiliation or association with a given religious sect. Third, the age of the students at issue provides another critical distinction between the two cases. In *Weisman*, the plaintiff was a member of the graduating class at a public *middle school*. In *Jones*, the plaintiffs were

members of a *high school* graduating class. Finally, the location of the ceremonies at issue is also important. In *Weisman*, the graduation exercises were held on school grounds. In *Jones*, the graduation exercises were held away from school grounds. Due to each of these factual differences, *Jones* should not be tied to *Weisman* and the jurisprudence in *Jones* need not be delayed, pending the outcome in *Weisman*. Petitioners' request to hold this petition, therefore, should be denied.

B. The Fifth Circuit Correctly Applied the *Lemon* Test.

The Fifth Circuit, in a unanimous decision, found the actions of the School District to be constitutional under the *Lemon* test. The Petitioners argue, however, that the Fifth Circuit improperly applied each of the three prongs of the test.

1. The Effect Prong.

Petitioners would have this Court hold that, regardless of the context in which it is uttered, any reference to a deity is "prayer," and thus, violative of the "effect" prong in *Lemon*. To reach this conclusion, however, would undercut the logic of the *Lemon* test: namely, to treat each Establishment Clause case as fact specific.

As the Fifth Circuit correctly noted, in determining the primary effect of the School District's Resolution, the Resolution must be viewed in the context of an entire graduation ceremony. *Jones*, 930 F.2d at 421. Moreover, the Resolution must be viewed from the perspective of its intended audience, namely, high school seniors and their

parents, the majority of whom have reached the age of adulthood. Viewed in this light, the "effect" of the School District's Resolution is to solemnize and enhance the significance of the graduation ceremony to its attendees. Given, in particular, the age of the ceremony's attendees and the location of the event, the Resolution no more communicates an endorsement of religion than does our country's national motto or Pledge of Allegiance.

2. The Purpose Prong.

Petitioners have argued that the Fifth Circuit failed to examine the "actual purpose" behind the School District's Resolution. Contrary to what Petitioners contend, however, the Fifth Circuit did, in fact, examine the Resolution's actual purpose and subsequently concluded that the School District's "solemnization" rationale does not constitute a pretext for the introduction of prayer into the schools. *Jones*, 930 F.2d at 420. Moreover, the Fifth Circuit's inquiry fully satisfied the "deferential and limited" review that the Supreme Court has deemed proper. *Wallace v. Jaffree*, 472 U.S. 38, 75-76 (1985).

3. The Entanglement Prong.

As Justice O'Connor stated in *Lynch*, "[t]he entanglement prong of the *Lemon* test is properly limited to *institutional* entanglement." *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (emphasis added). To date, the Petitioners have yet to identify the religious institution or institutions that will become excessively entangled with Clear Creek Independent School District by virtue of the School District's adoption of the Resolution. For that matter, because the

Resolution explicitly dictates that invocations must be nonsectarian and written and presented by student volunteers, the Resolution "effectively excludes religious institutions from its purview." *Jones*, 930 F.2d at 423.

The Petitioners argue that Justice O'Connor's concurrence in *Lynch* is not dispositive, given the factual distinctions between *Lynch* and *Jones*. However, in their attempt to distinguish the two cases, Petitioners have mischaracterized the operation of the Resolution. The administrative review mandated by the Resolution is nothing more than a cursory screening process which occurs in advance of the graduation ceremony. The "government," as the Jones contend, is by no means "offering" the invocation. The task, as is the task of composing the invocation's text, is reserved exclusively for student volunteers.

CONCLUSION

In effect, the Petitioners seek a holding that all prayers are unconstitutional. Neither the Fifth Circuit not this Court's previous holdings agree. The Fifth Circuit stated: "We reject a reading of the First Amendment that would freeze either church and state or religion and politics into perpetually antagonistic postures." *Jones*, 930 F.2d at 420. This Court has also addressed this conflict. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984). "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S.

306, 313 (1952). These pronouncements illustrate that not all "prayers" are constitutional. In the case at bar, the Fifth Circuit has found the "prayers" in question to be constitutional.

The Petition for Writ of Certiorari should be denied, and this petition should not be held pending the final outcome of *Weisman*.

Respectfully submitted,

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DATED: September 17, 1991